COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

ATWATER INVESTORS, INC.

v.

LUDLOW ZONING BOARD OF APPEALS

No. 01-09

DECISION

January 26, 2004

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HOUSING APPEALS COMMITTEE

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DECISION

This is an appeal by Atwater Investors, Inc.,[1] from a decision of the Ludlow Zoning Board of Appeals, which granted, subject to a nineteen conditions, a comprehensive permit pursuant to G.L. c. 40B, §§ 20-23, for the construction of a mixed-income affordable housing development known as Southview Estates. These conditions would require Atwater to decrease the number of units, construct a second access road, revise the project design to address traffic safety concerns at the entrance to the development and at a nearby intersection, comply with local wetland restrictions, as well as numerous other restrictions. According to Atwater, these conditions make the project uneconomic and are not consistent with local needs. The Committee finds that the conditions imposed by the Board do make the project uneconomic and that the Board has failed to show that any of the conditions address a valid health, safety, environmental, or other local concern.

1 Hereinafter referred to variously as the "Developer," the "Applicant," the "Appellant," or "Atwater."

I. PROCEDURAL HISTORY

On December 19, 2000, Atwater submitted an application to the Ludlow Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23, to build 241 units of mixed-income affordable housing. Exh. 6. The housing is to be financed under the Federal Home Loan Bank of Boston's New England Fund (NEF), in cooperation with member bank, Woronoco Savings Bank. Exh. 6. After due notice and public hearing, the Ludlow Zoning Board of Appeals rendered its decision[2] on June 14, 2001, to grant a permit for construction of 195 units of housing subject to nineteen conditions.[3] Exh. 1. Atwater argues that eight of the conditions would make the proposal uneconomic, and were not required by similar projects completed locally. Atwater, therefore, filed an appeal with the Housing Appeals Committee (Committee) on July 6, 2001. Exh. 8. In response, the Board asserts that the preventive or corrective measures are necessary to mitigate local concerns including the density of development, emergency vehicle access, and traffic safety at the entrance to the project and at nearby intersections.

The Committee conducted a site visit, held a 4-day, *de novo* hearing, with witnesses sworn, full rights of cross examination, and a verbatim transcript. Witnesses for Atwater included Harry R. Jones, a licensed professional engineer, John T. Gillon, a traffic engineer, John Maganaro, a representative of Atwater Investors, Inc., and Robert Engler, a housing and community development consultant. Witnesses for the Board included Paul Dzubek, Director of

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2 The Board's decision was filed with the town clerk on June 14, 2001.

3 Nine of the nineteen conditions had multiple subparts.

Public Works and Town Engineer, and Gregory J. Chiara, a land use consultant and planning analyst. Following the presentation of evidence, counsel submitted post-hearing briefs.

A. Jurisdiction

To be eligible for a comprehensive permit and to maintain an appeal before the Housing Appeals Committee three jurisdictional requirements must be met. The project must be fundable under an affordable housing program, the Applicant must be a limited dividend organization, and it must control the site. 760 CMR 31.01(1). The Board granted the permit based upon the Applicant having met these requirements. Exh. 1. In addition, the Board acknowledges that the Town of Ludlow has not met any of the statutory minima defined in G.L. c. 40B, § 20 (e.g., that 10% of its housing stock is subsidized housing). 760 CMR 31.04; Exh. 1.

II. FACTUAL BACKGROUND

The project site consists of approximately 80 acres of land off Fuller Street and located in the Agricultural District under the Town of Ludlow Zoning By-Law. Exh. 4. The Agricultural District limits residential development to single-family homes on building lots of at least 40,000 square feet in size. Exh. 1. As zoned, the project area would be suitable for at least 60 single-family homes. Tr. II, 154:1; Exh. 1. The project as proposed, would include the construction of 241 single-family duplex and triplex condominium units ranging in size from 1,100 to 1,300 square feet, all with two bedrooms, plus garages. Exh. 6. Of the 241 units, 61 would be affordable homes and 180 would be market rate homes. Tr. III, 33-34. The area in the immediate vicinity of the project is sparsely developed and is essentially open space on three sides. Exh. 1. About a half dozen single-family homes are located on the easterly side of Fuller

Street, across from the project area. Exh. 1. The project would be connected to the Ludlow municipal sewer system and to the municipal water system owned and operated by the City of Springfield. Exh. 1. The construction is to be completed in 4 phases consisting of Phase 1 (51 units), Phase 2 (79 units), Phase 3 (67 units), and phase 4 (44 units). Exh. 1.

During the local hearing, the Board granted the comprehensive permit with conditions, including a reduction of the number of units to 195. Exh. 1. Several factual issues have been raised as to the validity of the conditions, resulting in the Developer challenging the following conditions:

Condition 7(d) requires that all detention basins be constructed to meet any requirements imposed by the local Conservation Commission and shall at least be capable of storing a volume of water equal to the difference between pre-development and post-development run-off from a twenty five (25) year storm event as well as the capability of directing the overflow from a 100 year storm event to a drainage course designed for such an event which will not interfere with the residential units.

Condition 8(a) directs that all roadways within the project comply with the design standards contained in the Town of Ludlow Regulations for the Subdivision of Land as issued by the Ludlow Planning Board (Subdivision Regulations). The only design standard that is in dispute is Section A (4) (a), prohibiting dead end streets greater than 1,000 feet in length. Condition 8(b) also relates to Section A (4) (a) of the Subdivision Regulations, requiring the construction of two separate entrances into the project area from Fuller Street.

Condition 12(a) and (b) require that a portion of both of the open space park/recreation areas be devoted to a "tot lot," and that these spaces be accessible by sidewalks from all units in

each phase of the project. Condition 13 restricts leasing of units and requiring that all units be owner-occupied. Condition 14 requires revisions to the project design to improve sight distances at the entrance to the project on Fuller Street and to devise a means by which to lessen the impact on the nearby Fuller/Chapin Street intersection. Condition 16 decreases the number of units to 195.

Condition 19(b) directs the Developer to obtain an Order of Conditions from the Ludlow Conservation Commission under both the State Wetlands Protection Act and the local wetlands by-law. Condition 19(d) requires that each phase of the project be completed, with all units ready for occupancy, before commencement of construction of the next phase.

III. APPROVAL WITH CONDITIONS

When a zoning board of appeals has granted a comprehensive permit subject to conditions, the burden is on the Appellant to first prove that the conditions "in aggregate" make construction and operation of the housing "uneconomic." 760 CMR 31.06(3); *Hastings Village, Inc. v. Wellesley Board of Appeals*, No. 95-05, slip op. at 10 (Mass. Housing Appeals Committee Jan. 8, 1998). Specifically, the Developer must prove that "the conditions imposed...make it impossible to proceed... and still realize a reasonable return as defined by the applicable subsidizing agency...." 760 CMR 31.06(3)(b); see also G.L. c. 40B, § 20.

If the Developer meets this burden, the burden then shifts to the Board to prove "first that there is a valid health, safety, environmental, design, open space, or other local concern which

supports the conditions, and then that such concern outweighs the regional housing need." 760 CMR 31.06(7).

A. Uneconomic

Of the various conditions imposed by the Board that could make construction and operation of the housing "uneconomic," Atwater primarily focused on the cost of requiring a second access road and the reduction in the project from 241 units to 195. At the hearing, the Applicant provided five pro formas which were accepted into evidence.[4] Exh. 38A, 38B, 39, 40A, 40B. In addition, two witnesses, John Manganaro and Rober Engler, provided testimony as to how costs and profits were estimated on the pro formas. Tr. III, 33-55; 105-113; 115-117.

The Board did not provide their own witnesses to testify on the content of these pro formas, but instead attempted to show that the figures were inaccurate through cross-examination of the Applicant's witnesses. Tr. III, 59-99, 113-117. Based on this cross-examination, the Board argues that the acquisition value of the property is overstated and the hard cost for a second access road is inflated in the pro formas. See Board's Brief, p. 8. Therefore, it is necessary to review these two estimated costs to determine if they were fairly represented before considering the reasonable rate of return and whether the conditions required by the Board would make the project uneconomic.

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4 John Manganaro of Atwater Investments, Inc., is a "non-practicing" certified public accountant. He prepared the pro formas in conjunction with Atwater's consultant, Robert Engler. These two witnesses provided all of the testimony on the proposed budgets for this project. Tr. III, 29-117.

1. Acquisition Value of the Property

Under the "hard costs" section of the pro formas, the acquisition value[5] of the property is indicated to be $1,205,000. The Board argues that this hard cost is "overstated," resulting in over inflated development costs and under represented profits. See Board's Brief, p. 8. According to the Board, the original purchase price paid by Atwater for the property in 1993 was $165,000. Tr. III, 62. In addition, Atwater paid $55,000 in back taxes, $5,000 in legal fees, and $150,000 to clean up one acre of the property that had once been a disposal site. Tr. III, 63-64. The Board therefore asserts that the Applicant expended approximately $375,000 for acquisition and improvements to the property and has overstated the acquisition value of the property on the pro formas to the amount of $875,000. See Board's Brief, p. 8; Tr. III, 62-65; Tr. IV, 83-86.

On direct examination, Mr. Manganaro testified that the estimated acquisition value was in keeping with the statement in the Board's decision that under current zoning the property included 60 lots that could be used for the construction of single-family homes. Tr. III, 33; Exh. 1, p. 16. Based on that assessment, combined with his knowledge that the going rate for a raw lot for a single-family home in Ludlow was $25,000 per lot, Mr. Manganaro estimated the value of the land to be approximately $1.5 million. Tr. III, 33. Mr. Engler's agreed with Mr. Manganaro's method for estimating the acquisition value and went on to add that the value is determined by what the Applicant "can sell this [property] to another Developer to build as-of-right 60 homes, and it's at that price, at $25,000 a unit or $1,500,000, take out your brokerage

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5 In the comprehensive permit scheme, "acquisition value" is a term that refers to a line item in the pro forma that provides an estimate as to the value of the property proposed for development. Use of this term is not necessarily solely related to what was paid to acquire the property and should not be confused with "acquisition value" as used in assessing property tax. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1, 6 (1992) and *Allen v. Commissioner of Corporations and Taxation*, 272 Mass. 502, 507, 172 N.E. 643, 645 (1930).

fees and what have you, we think that we fairly represented this at a $1,205,000." Tr. III, 109. Mr. Engler also testified that this approximation was in keeping with acceptable methodology in the industry. Tr. III, 110.

The method proposed by the Applicant is also in keeping with the Committee's prior discussion that the acquisition value reflects the value of the "as-of-right" buildable lots under existing zoning, without the benefit of the comprehensive permit.[6] *9 North Walker Street Development v. Rehoboth*, No. 99-03, slip op. at 5 - 6 (Mass. Housing Appeals Committee June 11, 2003). Based on the testimony and evidence provided, the Committee finds that the acquisition value of the property is fairly reflected on the pro forma as $1,205,000.

2. Cost of the Second Access Road

Condition 8(b) requires the Applicant to provide a second access road into the development. Exh. 1 at 13. As with the acquisition value, the Board disagrees with the estimated cost represented on at least one of the pro formas for the construction of this road. Exh. 40B. Mr. Engler, Mr. Manganaro, and Harry R. Jones, a professional engineer who had been employed by the Applicant to develop the conceptual layout of the project, provided testimony on this issue. Once again, the Board did not submit any testimony evidence on this issue, but instead sought to develop an estimate of the appropriate cost through cross-examination the Applicant's witnesses.

Of the five pro formas offered into evidence, Exhibit 40A and 40B contain cost estimates for construction of a second road. Exhibit 40A was prepared to reflect a project with195 homes and a second access road, or essentially the project as approved by the Board. Tr. III, 49. The

second access road was estimated to be 1,400 feet long and entirely through a wetland. Tr. III, 50. Exhibit 40B was a "hypothetical" representation designed to show the cost for a second access road, while keeping the originally proposed 241 units. Tr. III, 90. Exhibit 40B reflects not only the cost of constructing the second access road, but includes estimated mitigation costs for construction of the road through a wetland. Tr. III, 93-97; Tr. III, 110. The Developers attempt to estimate these costs in Exhibit 40B proved to be a point of confusion and resulted in a review and analysis of the projected wetland mitigation costs.[7] Tr. III, 82-97. However, it is Exhibit 40A that reflects the conditions placed on the Applicant by the Board's decision and therefore the following discussion focuses only on the accuracy of the estimations reflected in that exhibit.

Mr. Manganaro testified that the second access would require approximately 1,400 feet of roadway and that the cost for "putting in a road with no issues" would be roughly $250 per foot, making the estimated cost of the second access road $350,000. Tr. III, 92. The Board did not refute this cost estimation. In fact, the Board used this estimation in cross-examining Mr. Manganaro and in subsequent argument. Tr. III, 88; IV, 84; Board's Brief, p. 9. The "hard cost" increase represented in Exhibit 40A for the second road is $365,000, with on-site utilities/drainage being estimated at $185,000 and road/site improvements being estimated at $180,000. Exh. 40A; Tr. III, 89. Although this is $15,000 greater than the estimate provided by the testimony of Mr. Manganaro, it is in keeping with that estimate. Exh. 40A.

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6 This also appears to be compatible with the MassHousing "Acquisition Policy" for 40B projects. See http://mhfa.com/dev/db_policies_acqval.htm.

7 Mr. Manganaro attempted to clarify that Exhibit 40B was just a hypothetical estimation when he testified, "the problem I will have with that is that that exhibit, Exhibit 40B, is not one that the Town actually approved. They approved 40A. The Town approval is on 40A." Tr. III, 83-84.

Therefore, the increase in the hard costs on Exhibit 40A is a reasonable representation of the cost of installation of a second road, and does not include the associated costs of obtaining the necessary state and federal clearance, consulting fees, or mitigation measures, such as wetland replication that were reflected on Exhibit 40B. The credibility of Mr. Manganaro's testimony as to the estimations provided on Exhibit 40A is bolstered by the fact that the pro forma also shows a decrease in construction costs and in the soft cost estimates, due to a decrease in the number of units to be constructed.[8] Exh. 40A. Thus, the Committee finds that although the $365,000 estimated amount for road construction does not adequately reflect the additional cost of wetland replication, it is acceptable as a minimum estimate for the cost of complying with Condition 8(b).

3. Definition of Reasonable Return of Investment

Atwater has the burden of proving that compliance with the conditions imposed by the Board would make it impossible to proceed in building and/or operating the proposed project and still realize a "reasonable return" as defined by the applicable subsidizing agency. 760 CMR 31.06(3)(b). "The Developer can meet this burden by showing that it has approached the subsidizing agency, and that the agency has indicated that it will not fund the project because of the condition." *Delphic Associates LLC v. Hudson Bd. of Appeals*, No. 02-11, slip op. at 4 (Housing Appeals Committee Dec. 23, 2002); 760 CMR 31.06(3)(c). The actual minimum return that MHFA would determine to be reasonable was not directly established during the hearing. However, in a letter dated May 20, 2002, member bank, Woronoco Savings Bank, stated that it could not approve funding for the 195 unit or the 241 unit project with the

8 The overall decrease in hard costs for construction is $3,625,124 and the decrease in soft costs is

secondary access, as the corresponding projected returns of 4.7% and 7% would result in an insufficient return under NEF, as well as its own underwriting standards. Exh. 42.

Although, the Board acknowledges that the lender would not approve funding for the project with a 7% return, it argues that the lender did not state what percentage would be acceptable. See Board's Brief, p. 10. The Board directs the Committee's attention to the testimony of the Developer's consultant, Robert Engler, who stated that 10% would be a normal minimum reasonable return. Tr. III, 106.

However, in his testimony Mr. Engler stressed that there were two reasons why 10% would not be a reasonable return for this project. First, the project is in the western portion of the state, which Mr. Engler asserts does not have as strong a real estate market as the eastern portion of the state, making 40B developments less profitable and less able to compensate for the cost of the affordable units. Tr. III, 105. Second, it is Mr. Engler's assessment that the cost estimations provided by Atwater for this development were lower than would be expected. Tr. III, 107. Therefore, Mr. Engler determined that the Developer had not built in any margin for error and anything below 11.1% would not provide a reasonable return on the investment. Tr. III, 110-12.

It is unnecessary in the current case to decide whether the reasonable return would be 10 or 11.1%, as the evidence confirms that compliance with Condition 8(b), requiring a second access road, and Condition 16, decreasing the number of units to 195, will only result in a 4.7% profit. Exh. 40A. As the NEF member bank found a return rate of 4.7% to be unacceptable, the Applicant has established under 760 CMR 31.07(1)(f), that the conditions imposed by the Board would make building of the housing uneconomic. Exh. 42. 760 CMR 31.06(3)(c), 31.07(1)(f).

$135,901. Exh. 39, 40.

B. Consistent with Local Needs

Since the Applicant has sustained its initial burden, the burden shifts to the Board to prove that there is a valid health, safety, environmental, or other local concern that supports each of the conditions imposed, and that such concern outweighs the regional need for housing. 760 CMR 31.06(7).

1. Density

As with the acquisition value, the parties disagree about an acceptable method for determining density. In their decision, the Board conjectured that if all 80 acres of land within the project area were buildable, only three-quarters of the land would be available for actual building lots, as the remaining one-quarter would be devoted to roads, sidewalks and other infrastructure. Exh. 1 at 16. Therefore the Board concluded that 60 acres of land would yield approximately 65 building lots under current zoning. Exh. 1 at 16. The Board further concluded that the density of this project should not exceed three times the density that would be permitted under current zoning and accordingly should not exceed 195 units. Exh. 1 at 16.

The Applicant argues that the correct definition of density is the number of units per total possible land area and that there are actually 86 acres within the project area, if right of ways are included. Tr. I, 43. Consequently, the Applicant asserts that 241 units on 86 acres of project area would result in slightly less than 3 units per acre. Tr. I, 43. The Applicant also provided testimony and evidence that similar condominium projects within the Town have densities as great as 10 units per acre. Tr. I, 43-44; Exh. 16-23.

The Board justified the decrease in the number of units as necessary to address local concerns that a project of this magnitude, developed on real estate that is essentially open space

and in a largely undeveloped neighborhood, raised significant issues of density of development. Exh. 1 at 16. This statement is somewhat uninformative as to what "significant issues" were raised. The Board failed to define these concerns directly either through testimony, with evidence, or in the post hearing brief.

Regardless of which method of calculation is used to determine a numerical figure for density, with regard to the particular design before us we find that the Board has failed to sustain its burden of proving that there is any valid health, safety, environmental, design, open space, or other local concern that requires a reduction in the number of units. 760 CMR 31.06(7). In the absence of a legitimate local concern, it is unnecessary for the Committee to determine whether the concern outweighs the need for housing.

2. The Second Access Road.

Although the Town does not have a zoning requirement that prohibits single access roads,[9] the Board argues that the single access road proposed for this development raises significant safety concerns. Tr. IV, 34; Tr. 4, 19-20; 66-67. The project as proposed provides for a 1600-foot long road access from Fuller Street that would be the only access for approximately 80% of the units in the development. Tr. IV, 19; Exh. 12; Tr. IV, 40-41.

The Board argues that a catastrophic event or incidents such as a motor vehicle accident or some sort of utility disruption could prevent or restrict the flow of residential and emergency vehicle travel for a major portion of the development. Tr. 4, 19-20; pp. 66-67. The Board

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9 Some towns prohibit the layout of any dead-end roads in subdivision developments and require a "thoroughfare" connecting to other streets at both ends. Mark Bobrowski, Handbook of Massachusetts Land Use and Planning Law § 17.09A (2nd ed. 2002). The Town of Ludlow Subdivision Regulations, Section A (4) (a), permits dead-end roads, however it limits the length to no longer than 1000 feet, "unless, in the opinion of the Planning Board, a greater length is necessitated by topography or other local conditions." Exh. 3.

provided two expert witnesses at the hearing who testified "the main entrance [is] excessive in length in being a single access to afford service to the bulk of the development." Tr. IV, 19.[10] In addition, the Fire Chief expressed his concern in a letter to the Board dated January 29, 2001, that due to "the size of the development and with the large number of occupancies, it is all the more important that a secondary means of access is provided. If, for some reason, the lower section of the road becomes impassable, the majority of the structures in the development will not be accessible to emergency vehicles and personnel." Exh. 28.

According to Atwater, two other subdivisions in the Town have been constructed with long, single access roads. Tr. II, 84-95; Tr. III, 51. The burden in such instances is on the Applicant to prove "that local requirements or regulations have not been applied as equally as possible to subsidized and unsubsidized housing." 760 CMR 31.06 (4). To support their claim, Atwater referred to Chapin Greene Condominiums, which has 72 units and 900 feet of single access road that is 16 to 20 feet wide, and Meadow Crest Condominiums, which has 87 units and 800 feet of single access road that is 20 feet wide. Exh. 16. This evidence is unpersuasive as the roads in these two subdivisions immediately access the units within the subdivision and comply with the Subdivision Regulations, being less than 1000 feet in length. Exh. 17, 20. In contrast, Southview would have 1600 feet of roadway before it reaches the majority of the units.

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10 The Board also argues that the presence of a "high-pressure gas line" within the power transmission line right-of-way exacerbates the problem, strengthening the need for a second access. Tr. IV, 20; Exh. 7. According to the Board, about half of the units were on one side of the high-pressure gas line and about half on the other. It is their contention that if there was an incident involving the gas line, so that it could not be crossed, a substantial part of the project could have its access blocked. Tr. IV, p. 21. The proposed road in this segment of the project already provides two separate access points as it loops around at the north end of the project and crosses the right-of-way in two places. The second access road would join with the proposed road south of the right-of-way and would in no way alleviate this concern.

Therefore, we find this configuration dissimilar from the other projects referenced by the Developer. Exh. 16.

However, the Applicant has proposed a change in the road design that would include widening the single access road into a two-lane road, each lane having a width of 15 feet, separated by a 5-foot wide median (double-barreled road).[11] Exh. 14; Tr. IV, 59-61. The Applicant argues that this design would alleviate the Town's safety concerns by negating the likelihood of both lanes being blocked at the same time and by providing lane widths great enough to compensate flow of traffic in the remaining lane. Tr. IV, 59-60.

Even with the proposed change to a double-barreled road, the Board maintains that the road would be susceptible to being blocked by an accident or catastrophic event.[12] Tr. IV, 79-80. The Applicant offered credible expert testimony that this design would mitigate the Town's concern as to the single access road. According to the testimony of two expert witnesses, if an accident were to occur at the entrance as it intersects with Fuller Street or in one of the traffic lanes, the additional width of the lanes[13] combined with the median would allow traffic to be guided into and out of the development through the other lane of the boulevard. Tr. I, 34-35; Tr. II, 148. In addition, the standard proposed for curbing on the road is a "modified Cape Cod

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11 This road configuration was also referred to as a "boulevard" in the testimony.

12 The Town Engineer, testified that he was unaware that the Applicant had proposed a double-barreled road and that his first review of this design was during the hearing. The Board's second witness did offer testimony that the double-barreled road configuration was "inadequate." Tr. IV, 67. However, neither of these witnesses provided testimony that specifically addresses what aspects of the proposed design made it inadequate.

13 The Applicant's expert witness testified that the individual lane design of the double-barreled road should be wide enough to allow two vehicles to travel past each other or to get by an abandoned or disabled car in the same lane. Tr. II, 147-148. It was, therefore, his estimation that the width of the "barrels" or separate lanes should be 17 feet wide at a minimum. Tr. II, p. 148. The Board may choose to require that each lane be 17 feet wide instead of the 15 feet proposed by the Applicant.

berm" which is easily mountable and would provide for additional maneuverability, even for a larger accident, such as an accident involving two trucks. Tr. I, 35. Based on these design features, the witnesses testified that they had a great deal of difficultly envisioning a scenario that would entirely block off access into the development[14] and that a second access road would only be marginally safer than a double-barreled road. Tr. I, 40, 42, 57; Tr. II, 148.

The Board presented no evidence to establish what makes the double-barreled road design susceptible to being blocked in the same manner as a single access road.[15] Nor did the Board offer any explanation or evidence as to why the double-barreled road is an inferior and unacceptable alternative to the proposed second access. Therefore the Board has failed to maintain its burden in showing that the proposed double-barreled access road poses a valid safety concern.[16]

3. Traffic Safety

The Developer offered credible expert testimony to establish that the stopping distances and the level of service on Fuller Street comply with generally recognized traffic safety standards. Exh. 26, 35; Tr. I, 60-65; Vol. II, 113-148. Atwater's traffic expert testified that there would be no projected change in the level of service at local intersections if the development

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14 The traffic expert also testified that the project area was originally farm land, therefore there are no trees along the area proposed for the double-barreled road that could result in blockage from falling trees. Tr. I, 57-58.

15 The Board's cross-examination of the Applicant's witnesses did not focus on design features of the double-barreled road. Instead, the focus of this examination was almost exclusively on whether a second road would be finically feasible.

16 In addition, detailed testimony was provided on the issue of whether the Massachusetts Department of Environmental Protection (DEP) would permit such large portion of the second access road through a wetland. Tr. II, 89-103. The Board argued that a second access might be allowed by the DEP based on 310 CMR 10.53(3)(e). Tr. IV, 68-70. As the Board has failed to meet its burden, it is unnecessary to consider whether this regulation is applicable to the current case.

were built. Tr. II, 132. In addition, the witness testified that there was adequate stopping sight distance for the posted speed limit of 30 miles per hour.[17] Tr. II, 144.

The Board offered no evidence addressing the adequacy of the stopping distances and level of service on Fuller Street. Instead the Board attempted, through cross-examination of the Applicant's witness, to show that the sight stopping distance for the entrance to Fuller Street was inadequate and that unacceptable levels of traffic would be added to the intersections. Tr. II, pp. 64-66; Tr. III, pp. 10-28. Therefore, we find that the board has failed to sustain its burden of proving that traffic from the proposed project will result in a valid safety concern.

4. The Remaining Conditions

Both parties agree that no testimony was offered on Conditions 12(a) and (b) requiring dedicated "tot lots" and sidewalks to the open spaces; Condition 13 prohibiting leasing of units; and Condition 19(d) requiring that the project be built in separate phases. In addition, the Appellant provided the only evidence on Condition 7(d), which included credible expert testimony[18] that the design of the detention basin as proposed by the Developer is adequate to the size of the project and would be in conformance with criteria established by the state. Tr. II, 22-27. The Board also failed to provide any evidence to show that Condition 19(b) addresses a valid health, safety, environmental, or other local concern that should require compliance with the 25-foot "no disturb" zone prescribed by the local wetlands by-law. Instead the Board

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17 The Board expressed a concern that there might not be adequate site distance for the 85th percentile speed of 40 miles per hour. Although that is not the posted speed, which is 30 miles per hour, testimony was offered which established that the site distance was more likely than not adequate for that speed as well. Tr. II, 143-44.

18 This witness further stated that the requirements proposed in this Condition are not part of the Town wetland by-law, has not been required by any other project locally, and it was his belief that such a condition has never been applied in any other community in the Commonwealth. Tr. II, 24.

attempted to establish through cross-examination that compliance was feasible if the Developer moved or removed some of the proposed units and drainage basins.[19] Tr. II, pp. 35-60.

As the Applicant met its burden of proving that the conditions devised by the Board would make the project uneconomic, the burden of proof was on the Board to show that there is a valid health, safety, environmental, or other local concern that supports compliance with each of the above mentioned conditions. As the Board has failed to meet this burden and these conditions will be stricken given there is no evidence to support the Board's position.[20] See 760 CMR 31.06(6); see also *Hanover v. Housing Appeals Committee*, 363 Mass. 339, 365, 294 N.E.2d 393, 413 (1973); *Hamilton Housing Authority v. Hamilton*, No. 86-21, slip op. at 11 (Mass. Housing Appeals Committee, Dec. 15, 1998).

IV. CONCLUSION

Based upon review of the entire record and upon the findings of fact and discussion above, the Housing Appeals Committee affirms the granting of a comprehensive permit by the Ludlow Board of Appeals. Further, the Committee concludes, pursuant to G. L. c. 40B, §23, that certain of the conditions imposed in the Board's decision render the project uneconomic and are not consistent with local needs. The Board is directed to issue an amended comprehensive permit as provided in the text of this decision and the conditions below.

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19 There was no discussion as to whether it was economically feasible to do this, instead the Board was attempting to show that moving units and other features around, it might be possible to comply with the requirements of the local by-law.

20 Further, by not briefing these issues or presenting evidence, it is arguable that the Board waived these claims. See *An-Co, Inc. v. Havehrill Board of Appeals*, No. 90-11, slip op. at 19 (Mass. Housing Appeals Committee June 28, 1994) (citing *Lois v. Berlin*, 338 Mass. 10, 13-14 (1958)).

1. Conditions 7(d), 8(a) and (b), 12(a) and (b), 13, 14, 16, 19(a) and (b) of the comprehensive permit (Exhibit 1) shall be deleted. The permit will be for the construction of 241 units of mixed-income affordable housing.

2. The main access road into the development from Fuller Street shall be a two-lane road, separated by a five-foot wide median. Each lane must have a width of at least fifteen feet, however, the Board may require that each lane be up to 17 feet in width.

3. Should the Board fail to carry out this order within thirty days, then, pursuant to G.L. c. 40B, s. 23 and 760 CMR 31.09(1), this Final decision shall for all purposes be deemed the action of the Board.

4. Because the Housing Appeals Committee has resolved only those issues placed before it by the parties, the comprehensive permit shall be subject to the following further conditions:

(a) Construction in all particulars shall be in accordance with all presently applicable local zoning and other by-laws except those waived by this decision or in prior proceedings in this case.

(b) The subsidizing agency may impose additional requirements for site and building design so long as they do not result in less protection of local concerns than provided in the original design or by conditions imposed by the Board or this decision.

(c) If anything in this decision should seem to permit the construction or operation of housing in accordance with standards less safe than the applicable building and site plan requirements of this subsidizing agency, the standards of such agency shall control.

(d) No construction shall commence until detailed construction plans and specifications have been reviewed and have received final approval from the subsidizing agency, until such agency

has granted or approved construction financing, and until subsidy funding for the project has been committed.

(e) The Board shall take whatever steps are necessary to insure that a building permit is issued to the applicant, without undue delay, upon presentation of construction plans which conform to the comprehensive permit and the Massachusetts Uniform Building Code.

This decision may be reviewed in accordance with the provisions of G. L. c. 40B, §22 and G. L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: January 26, 2004

Werner Lohe, Chairman

Joseph P. Henefield

Marion V. McEttrick

Frances C. Volkmann

Glenna J. Sheveland, Research Counsel